UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

OBERTHUR TECHNOLOGIES OF AMERICA CORPORATION	
and	Cases 04-CA-128098 04-CA-132055 04-CA-134781 and 04-CA-158860
LOCAL 14 M, DISTRICT COUNCIL 9, GRAPHIC COMMUNICATIONS CONFERENCE/INTERNATIONAL BROTHERHOOD OF TEAMSTERS	

ANSWERING BRIEF OF RESPONDENT OBERTHUR TECHNOLOGIES OF AMERICA CORP. TO EXCEPTIONS FILED BY COUNSEL FOR THE GENERAL COUNSEL AND BY THE CHARGING PARTY

Respectfully submitted,

Dated: July 28, 2016

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The Respondent, Oberthur Technologies of America Corp. ("Oberthur" or "Employer"), hereby submits this Answering Brief in response to the Exceptions filed by Counsel for the General Counsel and by Local 14M, district Council 9, Graphic Communications Conference/International Brotherhood of Teamsters (the "Union") to the Decision of Administrative Law Judge Arthur J. Amchan in the above-captioned matter.

INTRODUCTION

This case arises out of Oberthur's termination of four employees for flagrant violations of long-established workplace policies. The employees[1] at issue were terminated for, respectively, operating a forklift in an unsanctioned and unsafe manner, fighting, and using racially offensive language.

Three of the terminations at issue took place between February 2014 and July 2014, with the fourth termination occurring on July 27, 2015. Subsequent to the final termination, the Union was certified as the collective bargaining representative for a unit of Respondent's employees. The Board's Certification of Representative followed a lengthy process stemming from a September 2012 election in which 108 employees voted in favor of representation by the Union, 106 voted against, and three ballots were challenged.

The Union filed the four unfair labor practices at issue, which have been consolidated for purposes of these proceedings, alleging that Oberthur failed to bargain with the Union concerning the terminations of the Discharged Employees. Following a hearing, Administrative Law Judge Amchan concluded – in light of the invalidity of the Board's decision in *Alan Ritchey*, 359 NLRB No. 40 (2012) – that Oberthur was not bound to bargain with the Union prior

[1] The four former employees are Dan Clay, Harvey Werstler, Albert Anderson and Lawrence Bennethum. Those individuals will be collectively referred to herein as the "Discharged Employees."

to terminating the Discharged Employees for violations of disciplinary policies that predated the Union's appearance at its facility. In their respective Exceptions, both the General Counsel and the Union argue, without explicitly so stating, that the *Alan Ritchey* standard should have been applied by the Administrative Law Judge such that Oberthur should have been found in violation of the Act for not having bargained with the Union prior to the terminations. As fully set forth herein, that exception is without merit. Administrative Law Judge Amchan properly applied Board precedent in concluding that no such duty to bargain prior to the terminations existed on the facts of this case.

The General Counsel and the Union have further excepted to the Administrative Law Judge's application of Section 10(c) of the Act to deny an award of reinstatement, back pay, and reimbursement of job-search expenses. Having found that Oberthur violated the Act by failing to bargain with the Union subsequent to the terminations,[2] Judge Amchan went on to consider what remedy was appropriate in connection with the consolidated Charges. As set forth herein, Judge Amchan was correct in concluding that Section 10(c) supported a denial of reinstatement, back pay and expenses given that each of the Discharged Employees was terminated for misconduct.

FACTS AND PROCEDURAL HISTORY

A. Statement of Facts

Oberthur manufactures plastic cards, including credit cards and access control cards. The facts of this case concern events occurring at Oberthur's facility in Exton, Pennsylvania.

[2] As fully discussed in the Cross-Exceptions filed by Oberthur contemporaneously with this Answering Brief, it is Oberthur's position that any duty to bargain subsequent to the termination of the Discharged Employees was waived by the Union's failure to ever request to bargain, and that as a result the question of remedy is moot due to the absence of any violation of the Act.

On September 7, 2012, a representation election was held among a unit consisting of production and maintenance employees. G.C. Exhibit 2. That election resulted in 108 votes in favor of representation by the Union, 106 votes against, and three challenged ballots. *See Oberthur Technologies of America Corp.*, 362 NLRB No. 198 (2015). Following a hearing held in November 2012, Administrative Law Judge Raymond P. Green sustained two of the challenges and overruled the third. *Id.* Judge Green's decision was issued on February 20, 2013, and was the subject of exceptions by Oberthur.

On March 11, 2013, John Potts, Secretary/Treasurer of Local 14 of the Union demanded that Oberthur begin Collective Bargaining negotiations with the Union. G.C. Exhibit 2A. Four (4) days later, on March 15, 2013, Timothy R. Feely, General Counsel for Oberthur, responded to the Union's demand to bargain, explaining that Oberthur intended to appeal the ALJ's decision and would not begin Collective Bargaining negotiations until the ALJ's decision was finally decided. G.C. Exhibit 2(b). Judge Green's decision was ultimately affirmed by the Board pursuant to a decision issued on August 27, 2015. In connection with that decision, the Board issued a Certification of Representative.

The Certification of Representative was issued subsequent to each of the terminations at issue in this case, which resulted from three separate incidents occurring in 2014 and 2015. The circumstances of each of the terminations at issue are as follows:

Discharge of Albert Anderson

On or about February 7, 2014, Albert Anderson was discharged along with another employee, Emory Flowers, as a result of their intentional misconduct in using their forklift to lift another employee at least 15 feet in the air to conduct a year-end inventory. According to Oberthur's witnesses, Kurt Johnson, Human Resources Manager for Oberthur, and Nancy Kelly,

former Safety Director, the actions of Anderson and Flowers clearly violated the safety training they both were provided, as well as the OSHA Standard for Safe Handling of Forklifts. TR. at 49-56. Indeed, as explained by Johnson and Kelly, both employees were trained, as required by OSHA, under 29 C.F.R. § 1910.178, in the safe use of a forklift in the workplace. TR. at 102. On page 10 of the training materials provided to both Anderson and Flowers, it expressly states that a forklift should never be used to carry people. *See* G.C. Exhibit 7. Moreover, as made clear in the video that was explained by Nancy Kelly, both Anderson and Flowers engaged in an egregious act of misconduct by using a forklift to hoist another employee 10-15 feet in the air without any appropriate cage or harness. TR. at 102-106. According to Kelly, such practice not only violated OSHA's regulations and Oberthur's workplace standards, it also exposed the employees to serious injury and possibly death, either by falling from the raised forklift or having materials fall on the employee who was standing on the forklift as it moved about the plant. *Id.*

Kurt Johnson explained why both individuals were discharged and the process he went through in making that determination. TR. at 49-56. Johnson explained that because of the serious nature of the violation, both men were discharged. Johnson also explained that other employees who have violated Oberthur's workplace safety policies have also been terminated, including Kevin McMurray. TR. at 57-59; Employer's Exhibit 1. Johnson explained that McMurray was discharged because he attempted to move a large file cabinet in an unsafe manner which subsequently fell on him, potentially causing serious injury. McMurray was discharged on January 15, 2015. *Id.* Johnson testified that Oberthur has a "zero tolerance" policy with regard to unsafe work practices. TR. at 82.

On March 13, 2014, John Potts, the Union representative, wrote to Oberthur's counsel and specifically requested that "the Company provide us with the documentation concerning these terminations to include any disciplinary actions that led to the termination and the Company policy and disciplinary steps for which the terminations were based." G.C. Exhibit 5.

The letter went on, indicating that the Union requested "any notes of the investigatory meetings along with written reports generated by the Company's Human Resources department during its investigation." G.C. Exhibit 5.

Oberthur's counsel responded on March 18, 2014, that a response would be forthcoming. G.C. Exhibit 6.

On July 17, 2014, counsel responded to the Union's request for information by letter. G.C. Exhibit 7.

In that letter, counsel explained the nature of the investigation, the seriousness of the misconduct, and the reasons for the discharge. Counsel also provided the Union with a copy of a video which documented the clearly unsafe work practice of Anderson and Flowers, along with all of the training materials that both Flowers and Anderson had been required to comply with. *Id.*

Following receipt of that July 24th letter, Potts, the Union Representative, admitted that he reviewed the letter and the information attached to it and never requested to bargain with Oberthur over the discharge of Anderson. TR. at 38-39. In fact, Potts acknowledged that he had reviewed all of the information and never requested any additional information from Oberthur. *Id.*

Discharge of Dan Clay and Harvey Werstler

On or about July 14, 2014, Dan Clay and Harvey Werstler were discharged by Oberthur for fighting in the workplace. TR. at 31. By letter dated July 24, 2014, Potts again requested that Oberthur provide the Union with documentation concerning the terminations of the two, any disciplinary actions that led to the termination and the Company policy and disciplinary steps for which the terminations were based. G.C. Exhibit 8. As with Anderson, Potts did not request to bargain with Oberthur over the discharge, but only requested information. *Id.*

On August 11, 2014, Oberthur's counsel responded to Potts' July 24, 2014 letter, and provided a full explanation for why Clay and Werstler were fired. G.C. Exhibit 9. The two had gotten into an argument in the workplace with Clay calling Werstler a "mother fucker" along with other inappropriate language. Werstler admitted calling Clay a "son-of-a-bitch." *Id.* During the heated argument, Clay pushed Werstler at least three (3) times in the chest and Werstler responded with his own pushing. Both admitted that they had engaged in that misconduct. G.C. Exhibit 9.

At the hearing, Kurt Johnson described the circumstances surrounding the termination of Clay and Werstler and explained that both were fired for fighting in the workplace. TR. at 76-81. Johnson stated that others at Oberthur had been fired for similar misconduct, including Chris Abdalla and Wayne Davis, as well as Juan Medina, all three (3) of whom were discharged for fighting in the workplace. TR. at 76-82. Johnson explained that Oberthur has zero tolerance for violence in the workplace and that both Clay and Werstler were summarily discharged for violating that policy. TR. at 82.

With regard to the discharges of Clay and Werstler, Potts acknowledged that he had all the information that he had requested but never asked to bargain with Oberthur over those discharges. TR. at 41.

Discharge of Lawrence F. Bennethum

On July 27, 2015, Lawrence F. Bennethum was discharged by Oberthur for making a racial slur in the workplace. G.C. Exhibit 10. According to Kurt Johnson, when Bennethum was asked by another employee to get a hair bonnet for a third employee, Bennethum's response was "did the color of my skin change." TR. at 60-61. Johnson explained that several of the employees who were present and heard the offensive comment were offended by it and complained to Johnson about it. TR. at 63. Johnson explained that Oberthur has a "zero tolerance" policy with regard to discrimination or unprofessional, rude behavior in the work place. TR. at 83. Following an investigation and interviews with all of the witnesses present, Bennethum was discharged for making the highly offensive, racially charged comment in the workplace. Johnson also explained that other Oberthur employees have been terminated for similar misconduct, including Marcellus Barnett. TR. at 64-65. Barnett was terminated for writing on a board, "this is the light skinned section." *See* Employer's Exhibit 2. Johnson explained that Barnett was discharged for those racially charged comments. *Id.*

Johnson also stated that another Oberthur employee, Robert Hoffman, had been discharged for referring to another Oberthur employee as a "monkey." TR. at 68-70. Johnson explained that Oberthur has a zero tolerance with regard to any employee making racially offensive comments in the workplace.

Finally, another Oberthur employee, Hans Vorhauer, was also discharged for making a Nazi salute in the workplace that others found offensive. TR. at 72-73.

Johnson also explained that another employee, Steve Domsohn, was also discharged for making an offensive comment to a female Oberthur employee to the effect "bend over and I'll show you." TR. at 75-77, as was Michael Evans. TR. at 77.

On October 9, 2015, John Potts, Union Representative, wrote to Oberthur's counsel, requesting that Oberthur provide the Union with documentation concerning the termination of Bennethum. G.C. Exhibit 10. Nowhere in the October 9, 2015 letter did Potts request bargaining over the discharge of Bennethum. In response to questioning by the Union's counsel, Potts reiterated that he never requested bargaining over any of the discharges and, up to the present, never bargained over those discharges. TR. at 37. Instead, Potts stated that he chose to file an unfair labor practice charge. TR. at 39.

B. Procedural History

The first of the charges at issue in this case (Case 04-CA-128098) was filed by the Union on May 6, 2014. The Union thereafter filed charges in Case 04-CA-132055 on July 2, 2014, in Case 04-CA-134781 on August 15, 2014, and in Case 04-CA-158860 on August 26, 2015. An Amended Charge was filed in Case 04-CA-158860 on October 20, 2015. The cases were consolidated pursuant to an order issued by the Regional Director on October 27, 2015. In brief, the Complaint alleges that Oberthur violated Section 8(a)(1) and (5) of the Act by terminating the Discharged Employees without providing the Union notice and an opportunity to bargain and by delaying in its satisfaction of a request by the Union for information relating to the termination of Albert Anderson.

A hearing was held before Administrative Law Judge Arthur Amchan on April 13, 2016 in Philadelphia, Pennsylvania. Judge Amchan issued his Decision on June 16, 2016. The General Counsel filed Exceptions, along with a supporting Brief, on June 30, 2016. The Union

filed Exceptions, along with a supporting Brief, on July 14, 2016. As the General Counsel and the Union have filed Exceptions to the same aspects of Judge Amchan's Decision, and have advanced substantially the same arguments, this Answering Brief collectively addresses the Exceptions made by both the General Counsel and the Union.

ARGUMENT

I. The Administrative Law Judge was correct in declining to apply *Alan Ritchey* and in concluding that Oberthur was not obligated to bargain with the Union prior to the termination of the Discharged Employees.

With regard to Oberthur's alleged failure to bargain regarding the terminations, Judge Amchan concluded that although Oberthur was obligated to bargain subsequent to the terminations, it had no duty to bargain prior to terminating the Discharged Employees. The finding that Oberthur was not obligated to bargain prior to the terminations was entirely consistent with the Board's decision in *Fresno Bee*, 337 NLRB 1161 (2002).

Fresno Bee involved the termination and discipline of multiple employees. The employer took those acts unilaterally. Among the unfair labor practice charges advanced by the union that represented the terminated employees was a charge based on the employer's alleged duty to bargain with the union prior to imposing terminations and other forms of employee discipline. *Id.* at 1186. It was undisputed that the employer had not bargained with the union prior to terminating the employees. Nevertheless, the administrative law judge found, and the Board affirmed, that the employer was not bound to bargain prior to the terminations. In so finding, the administrative law judge acknowledged that the terminations at issue were discretionary, and in fact noted that "[e]mployee discipline, regardless of how exhaustively codified or systematized, requires some managerial discretion." *Id.* What was found to be dispositive, however, was the fact that the terminations were based upon "written disciplinary

policies and procedures that long antedate the Union's advent." *Id.* The administrative law judge concluded that because the employer had applied its "preexisting employment rules" in terminating the employees, "Respondent made no unilateral change in lawful terms or conditions of employment when it applied discipline." *Id.* at 1186-87. As a result, the employer was found not to have violating the act by terminating the employees without first bargaining with the union. *Id.*

The foregoing analysis applied in *Fresno Bee* is wholly applicable to the facts of the instant case. In terminating the Discharged Employees, Oberthur relied upon and applied existing work rules that predated the Union's appearance at its facility. The terminations thus did not represent a "unilateral change in lawful terms or conditions of employment," as recognized by *Fresno Bee*. Judge Amchan's decision not to find any violation based on Oberthur's act of not bargaining with the Union prior to terminating the Discharged Employees was thus entirely in keeping with applicable precedent.

Both the General Counsel and the Union have excepted to Judge Amchan's Decision on this point, arguing that it was error for the Judge to not find that Oberthur was obligated to bargain before implementing the terminations. Although both the General Counsel and the Union acknowledge in their respective briefs that *Alan Ritchey* is not good law, each relies upon *Alan Ritchey* as the principle grounds for their respective exceptions. In *Alan Ritchey*, the Board held for the first time that an employer may not unilaterally issue discretionary discipline during the period subsequent to a union's certification and prior to agreement upon a first contract. 359 NLRB No. 40, slip op. at 1. As both the General Counsel and Union admit in their briefs, however, the Board that issued *Alan Ritchey* was held to have lacked a quorum by the D.C. Circuit, and ultimately by the Supreme Court, in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

Judge Amchan was thus wholly justified in declining to apply *Alan Ritchey* to support a finding that Oberthur had a duty to bargain prior to terminating the Discharged Employees.

In advancing their exceptions on this issue, both the General Counsel and the Union have attempted to recast *Alan Ritchey* as "nothing new," and as having simply "clarified" existing law such that the *Alan Ritchey* standard can properly be applied to support a finding that Oberthur violated the Act by failing to bargain prior to the terminations. Such an argument ignores Board's own statement in *Alan Ritchey* that the Board "has never adequately addressed" the "central question posed by this case." 359 NLRB No. 40, slip op. at 1. Indeed, the Board went on to acknowledge in *Alan Ritchey* that "[t]he Board has never clearly and adequately explained whether (and, if so, to what extent)" the obligation to bargain with respect to unilateral, discretionary changes "applies to the unilateral discipline of individual employees." *Id.* at 2. Consistent with the acknowledgement as to the lack of a clear rule with regard to that issue, the Board determined that its holding in *Alan Ritchey* would be applied "prospectively only." *Id.* at 1. In sum, *Alan Ritchey* represented a clear movement beyond the Board's prior precedent, and the decision was subsequently invalidated by the Supreme Court. Administrative Law Judge Amchan thus acted appropriately in applying Board precedent as it existed prior to the since-nullified decision in *Alan Ritchey*. *See Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("It is for the Board, not the judge, to determine whether [Board] precedent should be varied.").[3]

[3] Oberthur submits that, consistent with its actions in *Alan Ritchey*, if the Board determines in this case that the *Alan Ritchey* standard is to be adopted, such a rule should be applied "prospectively only." *See also Adams & Associates, Inc.*, 20-CA-130613, 2015 WL 3759560 (NLRB Div. of Judges, June 16, 2015) (noting that "three of the four discharges involved here post-dated *Noel Canning* and thus occurred when it was clear when *Alan Ritchey* could no longer be relied upon. Under these circumstances, it would work an injustice to require Respondent to adhere to *Alan Ritchey*.").

As noted *supra*, application of *Fresno Bee* dictates a conclusion that Oberthur was not obligated to bargain with the Union prior to terminating the Discharged Employees. Notwithstanding the General Counsel's emphasis on the discretion allegedly exercised by Oberthur in terminating the Discharged Employees for violations of its work rules, *Fresno Bee* recognized that "[e]mployee discipline, regardless of how exhaustively codified or systematized, requires some managerial discretion. The variables in workplace situations and employee behaviors are too great to obviate all discretion in discipline." 337 NLRB at 1186. *Fresno Bee* went on to note that the policies underlying the discharges in that case had not been "unilaterally altered or unlawfully established," and on that basis concluded that the employer "made no unilateral change in lawful terms or conditions of employment when it applied discipline." *Id.* at 1186-87. Notably, that was found to be "true even though the discipline may have been tightened." *Id.* at 1187.

Indeed, with regard to several of the terminations at issue in *Fresno Bee*, evidence was introduced demonstrating that other employees had not been terminated for similar infractions. *See id.* at 1166 (noting, in discussion of employee terminated for appearing for work under the influence, that in the past an employee who had been drunk at work was told "to sleep it off"); *see also id.* at 1170 (noting, in discussion of employee terminated for sleeping on the job, that "[t]he General Counsel presented evidence of other employees caught sleeping who were not terminated"). Those facts are in marked contrast to those of the instant case, as Oberthur presented evidence that employees other than those at issue in the case had been terminated for safety violations (Emory Flowers, Kevin McMurray), fighting (Chris Abdalla, Wayne Davis, and well as Juan Medina) and violations of the harassment policy (Marcellus Barnett and Robert Hoffman). TR. at 57-59, 64-65, 68-70, 72-73, 75-82. As noted *supra*, despite the fact that the

employer in *Fresno Bee* had not discharged all employees that had violated the policies at issue, its application of its established policies was held not to represent a unilateral change in the terms of employment.

Given that *Alan Ritchey* is not presently good law, Judge Amchan correctly applied the standard articulated by *Fresno Bee* in concluding that Oberthur had not violated Sections 8(a)(1) and (5) in not bargaining with the Union prior to terminating the Discharged Employees. The terminations at issue in this case were made pursuant to work rules that predated the Union's first appearance at the facility. The exceptions advanced on this point by the General Counsel and the Union should properly be overruled.

II. The Administrative Law Judge correctly found that Section 10(c) of the Act precluded, on the facts of this case, an award of reinstatement and back pay.

Judge Amchan declined to order reinstatement and backpay for the Discharged Employees. In their respective briefs, both the General Counsel and the Union have raised exceptions to the Judge's decision not to grant such relief. The Judge's decision on that point, however, was entirely consistent with Section 10(c) of the Act.

Section 10(c) provides in relevant part that:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

29 U.S.C. § 160(c).

In *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 217 (1964), the Court explained that Section 10(c) "was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct." Congress intended that "'employees who are discharged or suspended for interfering with other employees at work . . . or for engaging in

activities . . . contrary to shop rules . . . or for other cause . . . will not be entitled to reinstatement.'" *Id.* at n. 11 (quoting H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 55 (1947)).

This is not a case, as in *Fibreboard*, where "the loss of employment stems directly from an unfair labor practice." *Id.* To the contrary, an allegation that Oberthur had violated Section 8(a)(3) of the Act was found by the General Counsel to be without merit, and no complaint was issued pursuant to Section 8(a)(3). *See* Decision at 1 n.1. In *Fibreboard*, the employees were not terminated for misconduct, but simply to reduce labor costs through subcontracting. Here, the four Discharged Employees were each terminated for cause. Oberthur's alleged failure to bargain played no part in its decision to terminate.

The Section 10(c) phrase "suspended or discharged for cause" means "discipline that is not imposed for a reason that is prohibited by the Act." *Anheuser-Busch, Inc.*, 351 NLRB 644, 647 (2007) (citing *Taracorp Indus.*, 273 NLRB 221, 222 n. 8 (1984)). In *Taracorp*, which was recently reaffirmed by the Board in *YRC Freight*, 360 NLRB No. 90, Supp. at 2 (2014), the Board held that "an employee discharged or disciplined for misconduct or any other nondiscriminatory reason is not entitled to reinstatement and back pay even though the employee's Section 7 rights may been violated by the employer in a context unrelated to the discharge or discipline." 273 NLRB at 222.

Section 10(c) prohibits a make-whole remedy where there is "not a sufficient nexus" between the employer's unfair labor practice "and the reason for the discharge (perceived misconduct)." *Id.* at 223. Thus, it is "inappropriate to order make-whole relief where the employees' discharges were not in themselves unlawful, but the violations occurred solely in the procedures by which the discharges were carried out." *Redway Carriers*, 274 NLRB 1359, 1359 n. 4 (1985) (Board denied reinstatement and back pay despite employer's violation of Section

8(a)(5) by discharging two employees without affording them pre-termination hearings, as required by the collective bargaining agreement).

In *Anheuser-Busch*, the Board held that Section 10(c) precludes a make-whole remedy where employees are disciplined for cause, even where the employer violated Section 8(a)(5) by failing to bargain. 351 NLRB at 650. In that case, the employer failed to bargain before unilaterally implementing a surveillance camera system which led to the employer discovering the misconduct. The employees were discharged consistent with the employer's policy. While a remedy of back pay and reinstatement was denied, the Board ordered the employer to cease and desist from its unlawful conduct and to bargain with the Union. *Id.* at 650. *See also Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095, 1097 (8th Cir. 1981) ("the Board lacks the power to order reinstatement or back pay for employees discharged for theft of company property, because to do so would violate section 10(c)"); *Massillon Community Hosp.*, 282 NLRB 675, 677 (1987) (despite employer's *Weingarten* violation, "the remedial restrictions imposed by Section 10(c) of the Act preclude us from providing a make-whole remedy").

The terminations of the Discharged Employees at issue in this case were based on violations of established work rules.

Albert Anderson was terminated by Oberthur on February 7, 2014 for using a forklift to lift an employee at least fifteen feet in the air to inspect items stored on elevated shelving.[4] Oberthur presented testimony at the hearing from two witnesses, Kurt Johnson, Human Resources Manager for Oberthur, and Nancy Kelly, former Safety Director, that Anderson's actions clearly violated the safety training that he had been provided by Oberthur, as well as the OSHA Standard for Safe Handling of Forklifts. TR. at 49-56. Indeed, as explained by Johnson

[4] A second employee, Emory Flowers, was also terminated as a result of the same incident.

and Kelly, Anderson had been trained, as required by OSHA under 29 C.F.R. § 1910.178, in the safe use of a forklift in the workplace. TR. at 102. On page 10 of the training materials provided to Anderson, it expressly states that a forklift should never be used to carry people. *See* G.C. Exhibit 7. Moreover, as made clear in the video evidence that was explained by Nancy Kelly, Anderson engaged in an egregious violation by using a forklift to hoist another employee 10-15 feet in the air without any appropriate cage or harness, creating a grave risk of injury. TR. at 102-106.

Dan Clay and Harvey Werstler were discharged by Oberthur on July 14, 2014 for fighting in the workplace. At the hearing, Kurt Johnson described Oberthur's zero tolerance policy for violence in the workplace, and identified three other employees who had been terminated for fighting. TR. at 76-82. Fighting on Oberthur's presence represented a direct violation of Oberthur's Workplace Violence Policy, which predated the Union's first involvement at the facility. G.C. Exhibit 12.

Lawrence F. Bennethum was discharged by Oberthur on July 27, 2015 for making a racial slur in the workplace. G.C. Exhibit 10. As explained by Kurt Johnson at the hearing, when Bennethum was asked by another employee to get a hair bonnet for a third employee, Bennethum's response was "did the color of my skin change." TR. at 60-61. Johnson explained that several of the employees who were present and heard the offensive comment were offended by it and complained to Johnson about it. TR. at 63. Johnson explained that Oberthur has a "zero tolerance" policy with regard to discrimination or unprofessional, rude behavior in the work place. TR. at 83. Oberthur's Unlawful Harassment Policy, which prohibits unlawful harassment and predates the Union's first appearance at Oberthur's facility, was introduced into evidence at the hearing. G.C. Exhibit 12. Johnson also explained that other Oberthur employees

have been terminated for similar misconduct, including Marcellus Barnett. TR. at 64-65. Barnett was terminated for writing on a board, "this is the light skinned section." *See* Employer's Exhibit 2. Johnson explained that Barnett was discharged for those racially charged comments. *Id.* Johnson also stated that another Oberthur employee, Robert Hoffman, had been discharged for referring to another Oberthur employee as a "monkey." TR. at 68-70. Johnson explained that Oberthur has a zero tolerance with regard to any employee making racially offensive comments in the workplace. Finally, another Oberthur employee, Hans Vorhauer, was also discharged for making a Nazi salute in the workplace that others found offensive. TR. at 72-73.

In sum, each of the Discharged Employees was terminated based upon violations of work rules which predated the Union's first contact with Oberthur. Contrary to the argument advanced by the General Counsel and the Union, Oberthur's termination of the Discharged Employees did not represent an "unlawful unilateral change" that would prevent application of Section 10(c).

III. The Administrative Law Judge correctly declined to order Oberthur to reimburse the discharged employees for expenses incurred in searching for new employment.

The final exception advanced by the Union concerns Judge Amchan's Decision not to make an award of expenses occurred by the Discharged Employees in searching for new employment. The sole argument advanced by the Union on this point consists of a reference to argument contained in the General Counsel's Post-Hearing Brief. *See* Union's Brief in Support of Exceptions at 17. Notably, although the General Counsel makes passing reference to search-for-work expenses in its Brief in support of its Exceptions, the General Counsel has advanced no substantive argument on this issue before the Board.

The Union's exception on this point is without merit, as there is no question that Judge Amchan correctly applied Board precedent in declining to award such expenses. Indeed, the General Counsel's Post-Hearing Brief expressly acknowledged that "the Board has considered these expenses as an offset to an unlawfully discharged employee's interim earnings rather than calculating them separately," and that "under current Board law, a unlawfully discharged employee who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses." *See* General Counsel's Post-Hearing Brief at 25. Judge Amchan's refusal of the General Counsel's invitation to deviate from established Board law was entirely proper. *See Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("It is for the Board, not the judge, to determine whether [Board] precedent should be varied.").

The Exceptions submitted by both the General Counsel and the Union fail to offer any meaningful support for their contention that the Board should adopt an entirely unprecedented rule with regard to the determination of an award of search-for-work expenses. Moreover, in light of Judge Amchan's conclusion with regard to the application of Section 10(c) to the terminations at issue, no such award would have been proper in any event. As the Judge's application of Section 10(c) was correct for the reasons discussed *supra*, the exception to the denial of an award of search-for-work expenses is without merit.

CONCLUSION

For the reasons set forth above, Respondent Oberthur Technologies of America Corp. respectfully requests that the Board overrule the exceptions filed by the General Counsel and by the Union, and find: (1) that the Administrative Law Judge did not err in finding that Respondent did not violate Section 8(a)(1) and (5) by not bargaining with the Union prior to the terminations

of the Discharged Employees; and (2) that the Administrative Law Judge did not err in declining to enter an award of reinstatement, backpay, and sear-for-work expenses.

Respectfully submitted,

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